Supreme Court, U. S.
FILED
MAR 26 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

78-1502

VITTORIO SOLVINO, Petitioner

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

VITTORIO SOLVINO, Petitioner

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

The Petitioner, VITTORIO SOLVINO, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered January 19, 1979. Petition for Rehearing In Banc was denied on February 26, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit has not yet been reported. It is reproduced in the Appendix

to this petition. The Denial of the petition for Rehearing In Banc is likewise reproduced in the Appendix.

JURISDICTION

The Denial of Petition for Rehearing In Banc before the Third Circuit Court of Appeals was entered on February 26, 1979. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(I).

QUESTIONS PRESENTED

Did not the trial court commit reversible error in denying the defendant an evidentiary hearing to establish his allegations of discriminatory prosecution?

Did not the trial court err in denying the defendant's request for the production of government documents?

STATEMENT OF THE CASE

The petitioner, VITTORIO SOLVINO, is an Italian citizen who was charged with having illegally re-entered this country after having previously been deported, in violation of 8 U.S.C. §1326.

Prior to trial, the defendant moved for an evidentiary hearing and the production of various government documents to substantiate the allegation of discriminatory prosecution.

Oral arguments on this motion were heard by the Honorable Herbert J. Stern, U.S.D.J., for the District of New Jersey on June 19, 1978. Judge Stern denied both the request for discovery and the motion for an evidentiary hearing.

On that same date the trial was held, the defendant having waived a jury trial and findings of fact. The only witness

for the government was Mr. Frank La Mort, a criminal investigator for the United States Immigration and Naturalization Service. In essence, Agent La Mort testified that he had received a file memorandum which stated that Mr. Solvino had been arrested and deported from the United States in 1970, and that it appeared that he was now in the United States. Mr. La Mort then stated that he arrested the defendant on April 13, 1978 in the Gloucester County Courthouse in Woodbury, New Jersey. Judge Stern adjudged the defendant guilty.

On July 20, 1978, the petitioner was sentenced to a period of two (2) years imprisonment, said sentence to be suspended, and an unsupervised probation period of five (5) years.

Notice of Appeal was filed with the Court of Appeals for the Third Circuit on

July 28, 1978. On January 19, 1979, the Third Circuit affirmed the rulings of the trial judge,(1a). Petitioner's Timely Petition for Rehearing In Banc was denied on February 26, 1979(2a).

REASONS FOR GRANTING THE WRIT

A. The trial court committed reversible error in denying VITTORIO SOLVINO's demand for an evidentiary hearing to establish his allegation of discriminatory prosecution.

The petitioner, VITTORIO SOLVINO, contended that he had been singled out for prosecution because of his Italian ancestry and because of his association with others of Italian descent.

The origin of the defense of discriminatory prosecution is set forth in the United States Supreme Court case of Yick Wo v. Hopkins, 118 U.S. 356, 373-374, 6 S.Ct. 1064, 1073, 30 L.Ed. 220 (1885). There it was held:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and unequal hand, so

> as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

It is now clear that such discrimination on the federal level is in violation of the due process clause of the fifth amendment. Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). So, too, any systematic discrimination in enforcement, United States v. Robinson, 311 F.Supp. 1063, 1065 (W.D.Mo. 1969) or unjust discrimination between persons in similar circumstances, Yick Wo, 118 U.S. at 374, 6 S.Ct. at 1073, violates the equal protection clause and renders the prosecution invalid. United States v. Berrigan, 482 F. 2d 171, 174 (3rd Cir. 1973).

The burden of proving intention or

purposeful discrimination is placed upon the defendant. United States v. Malinowski, 472 F.2d 850, 860 (3rd Cir. 1973). The courts have described that burden in various ways. In United States v. Berrigan, 482 F.2d at 177, it was stated, "Without denigrating the importance of the right of a person accused of crime to establish the presence of discriminatory prosecution, central to the issue must be some initial showing that there is a colorable basis for the contention."

Judge Dixon in United States v. Ahmad, 347 F.Supp. 912, 928 (M.D. Pa. 1972), stated that it was incumbent upon a defendant to present evidence from which at least an inference of the use of improper standards could be drawn.

Likewise, the court in United States v. Falk, 479 F. 2d 616 (7th Cir. 1973) defined the burden as follows:

> The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice. However, when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, we think a different question is raised.

In determining what it is that a defendant must prove, the Second Circuit Court of Appeals in United States v. Berrios, 501 F. 2d 1207 (2nd Cir. 1974) held:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e. based

> upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.' See Snowden v. Hughes, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497 (1943); Moss v. Hornig, 314 F. 2d 89, 92093 (2nd Cri. 1963); United States v. Ahmad, 347 F.Supp. 912 (M.D. Pa. 1972); aff'd sub nom., United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973); United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972), See Comment, 'The Right to Non-Discriminatory Enforcement of State Penal Laws,' 61 Colum. L. Rev. 1103 (1961). Mere 'conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.' Oyler v. Boles, 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed. 2d 446 (1962).

It further explained the "color basis" standard as follows, "We should first

require some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements'. United States v. Berrios, 501 F.2d at 1211-1212.

As was more fully set forth in the supporting affidavit,* the petitioner, VITTORIO SOLVINO, a citizen of Italy, reasonably believed he could have proved by testimonial and documentary evidence at a hearing the following:

(1) That there are literally millions of illegal aliens in this country;

(2) Each year there are thousands of such aliens who are arrested or detained by immigration authorities and, ultimately, deported;

(3) That there have been thousands of such deportees who have illegally reentered this country and were apprehended

* This affidavit was appended to the Brief in Support of the Motion for an Evidentiary Hearing.

by federal authorities;

(4) That in the vast majority of cases, deportees who illegally re-enter this country are rarely prosecuted criminally.

The petitioner sought to demonstrate by documentation and testimony that the only distinction in treatment between the aforementioned illegal aliens and himself was the fact that he is of Italian ancestry and associates with other of Italian descent. This type of selective enforcement of the statute violated his first and fifth amendment rights.

A similar averment of discriminatory prosecution based upon the petitioner's Italian heritage and associations was raised in United States v. Cammisano, 546 F.2d 238 (8th Cir. 1976), on remand, 433 F. Supp. 964 (W.D. Mo. 1977) wherein the indictment was dismissed for failure to

produce documents.

It is contended that the supporting affidavit demonstrates the requisite "colorable basis" for the granting of the hearing.

As was more specifically set forth in that affidavit, the petitioner believed he could prove the following facts:

(1) Criminal prosecutions under 8 U.S.C. §1326 are relatively rare in light of the total number of violators.

(2) The Newark Strike Force of the United States Department of Justice, whose primary responsibility is organized crime cases, conducted this prosecution and not the United States Attorney's Office who would not ordinarily handle such a prosecution.

(3) Bail was initially set at FIFTY THOUSAND ($50,000.00) DOLLARS on the criminal prosecution and TWENTY-FIVE THOUSAND

($25,000.00) DOLLARS for the administrative bail on the related deportation proceeding. These initial bails were extremely high in light of the two (2) year penalty fixed for violation of the statute in question. A reasonable inference can be drawn from this fact alone that the defendant was being illegally discriminated against.

(4) When sufficient security was raised by the petitioner on the reduced bail, the prosecution requested and was granted a Nebbia hearing to determine the source of such funds. Again, this is a most unusual procedure to be employed on an alleged 8 U.S.C. §1326 violation.

(5) At that Nebbia hearing, the prosecution continually raised the petitioner's alleged association with others of Italian heritage who were alleged to be involved in criminal activities.

In short, a strong inference can be

gleaned from the foregoing that the only reason Mr. solvino was prosecuted is due to his heritage, and the prosecution's unfounded "suspicion" that he is associated with other unknown criminal activities and persons.

This type of discriminatory and selective prosecution is violative of the United States Constitution, and there was a sufficient showing of a "colorable basis" to conduct an evidentiary hearing.

While it is acknowledged that hearings are not granted as a matter of right, when, as here, a sufficient showing has been made, the courts have granted them. United States v. Oaks, 508 F.2d 1403 (9th Cir. 1974); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) and United States v. Ahmad, 347 F.Supp. 912 (M.D. Pa. 1972). See also: United States v. Falk, supra, where the trial court was reversed for

failure to conduct such a hearing.

Thus, the trial court erred in not granting the petitioner an evidentiary hearing which would have enabled him to prove discriminatory prosecution. The failure to grant such a hearing is reversible error requiring the judgment of guilty to be vacated; requiring a reversal of the Judgment Order of the Court of Appeals for the Third Circuit; and, further, requiring an evidentiary hearing to be held. It is respectfully requested that this court grant certiorari in the present case in order to establish the much needed guidelines for a proper determination of whether a colorable basis has, in fact, been shown.

B. The trial judge erred in denying petitioner's request for the production of government documents.

The petitioner moved for the production of certain documents in the possession

of the Government. In brief, those requests can be broken down into two categories. The first group sought copies of statistical reports regarding the numbers of deportees who have been apprehended after re-entering the country. These statistics were clearly relevant in establishing that the defendant has not been treated as others similarly situated.

The Government could not have reasonably objected on the basis of Rule 16(b), since these statistical reports did not seek "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents.in connection with the investigation or prosecution of the case" (Emphasis added).

As is evident, this series of requests was not made to conduct a "fishing expedition" into the government files of the Solvino case. Rather, it related to infor-

mation about other cases in a reasonable attempt to demonstrate selective enforcement of the statute. See: United States v. Ahmad, 347 F.Supp. at 926.

With respect to the second category of requested documents, which related to internal government files relating to policies and decisions made in the Solvino case and other 8 U.S.C. §1326 prosecutions, it was and still is contended that the government's claim of confidentiality and executive privilege must give way to the due process rights of the defendant to obtain a fair and full hearing.

As the Court said in United States v. Oaks, 508 F.2d 1405:

> "If the defendant makes an initial factual showing of impermissible discrimination, then the trial court may, in the exercise of its discretion, require disclosure of relevant privileged information. See United States v. Berrigan, 482 F.2d at 181. But even then the court can

> minimize the risk to the government by holding the proceedings in camera and issuing appropriate protective orders." Fed. R. Crim. P. 16(e).

The petitioner had shown such a "colorable basis" for the trial court to require the production of the requested internal government files.

Chief Justice Burger in United States v. Nixon, 418 U.S. 683, 713, 94 S.Ct. 3090, 3110, 41 L.Ed. 2d 1039, 1066 (1974) in granting discovery in that case, rested his decision upon "the fundamental demands of due process of law in the fair administration of criminal justice."

> "United States v. Nixon made clear that even a presumptively valid claim of Presidential privilege must be considered in light of our historic commitment to the rule of law administered in accordance with an adversary system of criminal justice. That case concluded that:
> 'The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The

ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defence.' (Id. at 709, 94 S.Ct. at 3108, 41 L.Ed. 2d at 1064).

United States v. Nixon applied and reiterated long established principles when it concluded that 'the right to the production of all evidence at a criminal trial . . . has constitutional dimensions.' (id. at 711, 94 S.Ct. at 3109, 41 L.Ed.2d at 1066), and that 'the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.' (Id. at 712, 94 S.Ct. at 3110, 41 L.Ed.2d at 1066) (United States v. Cammisano, supra, 413 F.Supp. at 892-93.)" United States v. Cammisano, 546 F.2d 238, 240-241, (8th Cir. 1976).

The requests in the second category made by the petitioner Solvino were very similar to those that were produced and granted in the Cammisano case.

For all of the foregoing reasons, it is therefore respectfully urged that this Court vacate the determination made by the trial court and order the United States to comply with the discovery sought by petitioner Solvino.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 78-2062

UNITED STATES OF AMERICA

v.

VITTORIO SOLVINO,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
Crim. No. 78-00121

Submitted Under Third Circuit Rule 12(6)
January 16, 1979

Before: ADAMS and WEIS, Circuit Judges, and
WEINER, District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, namely, that (1) the trial court erred in not ordering an evidentiary hearing to enable the defendant to prove that he was a victim of discriminatory prosecution; and (2) the trial court erred in not granting the defendant's requests for the production of documents, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

Circuit Judge

ATTEST:

Thomas F. Quinn, Clerk

DATED: January 19, 1979

* Hon. Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 78-2062

UNITED STATES OF AMERICA,

v.

VITTORIO SOLVINO,
Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, GIBBONS, ADAMS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, Circuit Judges and WEINER*

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: February 26, 1979

* Hon. Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.